Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-618

HOWARD BRAMBLETT,

Petitioner

-vs-

THE STATE OF GEORGIA,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

HOWARD BRAMBLETT, :
PETITIONER
: CASE NO._____
-versus-
:
STATE OF GEORGIA,
RESPONDANT :

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF GEORGIA

Petitioner respectfully prays that a Writ of Certiorari issue to review the Final Order of the Supreme Court of Georgia in the case of HOWARD BRAMBLETT versus STATE, being NO. 31,781, decided June 7, 1977, which order affirmed the Judgment of the Court of Appeals of the State of Georgia.

OPINIONS BELOW

The order of the Supreme Court of Georgia in case No. 31,781, decided June 7, 1977, affirming the judgment and opinion of the Court of Appeals of Georgia was accompanied by an official opinion which is reported at

Volume 239 of the Georgia Reports pages 336-342 (1977). The judgement and opinion of the Court of Appeals of Georgia affirming the conviction of the Petitioner is reported at Volume 139 of the Georgia Appeals Reports, pages 745-751 (1976).

JURISDICTION

The final order of the Georgia Supreme Court which affirmed the conviction of the Petitioner in the Whitfield County Superior Court was decided on June 7, 1977. Since substantial Federal Questions arising under the Constitution of the United States are involved in this case, the jurisdiction of this Court is invoked under the provisions of Article III Section 2, of the Constitution of the United States, 28 United States Code Section 1257 (3) and Rule 19 (a) of the rule of the United States Supreme Court.

QUESTION PRESENTED

(I) Was the warrantless seizure of a motor vehicle, which was parked in a driveway

at the time of its seizure, done without probable cause in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States?

(III) Subsquent to the seizure of the parked motor vehicle was it searched illegally under a search warrant which was issued by a magistrate who was not neutral and detached as required by the Fourth and Fourteenth Amendments to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS INVOLVED

FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions presented in this case were raised by a Motion to Suppress filed by Petitioner and can be briefly stated as follows:

(a) STATEMENT OF PLEADINGS IN THE CASE:

The Petitioner was indicted jointly with

his brother, LEONARD BRAMBLETT and HOWARD GODFREY on Indictment No. 9269 in the Whitfield County Superior Court, charged in Count One (1) with the offense of burglary and in Count Two (2) of said indictment with the offense of theft by taking. Count Two (2) of the indictment alleged that the Defendant did unlawfully "take eleven (11) cases of yarn Beaunit 2500-2 Ply Lot No. 172, of the value of ONE THOUSAND NINE HUNDRED AND TWENTY-FIVE DOLLARS ($1,925.00), property of M. Lowenstein and Sons, Inc., d/b/a Wamsutta Carpet Mills, with the intention of depriving said owner of said property." (R. 2,3). A Motion to Supress illegally seized evidence was filed in the Superior Court of Whitfield County (R-4-6) on November 20, 1975. The Motion to Supress, as amended, alleged that on or about the 18th or 19th day of August, 1974, the Defendant LEONARD BRAMBLETT and the Petitioner were arrested by law enforcement officers at the residence of LEONARD BRAMBLETT in Dalton, Whitfield County, Georgia, and that said arrest

and entry was warrantless and without probable cause. The Motion to Supress, as amended also alleged that the seizure of the van truck which contained the allegedly stolen property was illegal and contrary to the Fourth and Fourteenth Amendments to the Constitution of the United States (R. 2,3). In addition, the amended Motion to Supress alleged that the warrant to search the 1974 Super Van Ford was issued by Justice of the Peace who was not a neutral and detached magistrate at the time of the issuance of said warrant because he had a direct pecuniary interest in the issuance of said warrant inasmuch as he and all other Justices of the Peace in the State of Georgia received or are entitled to receive Five Dollars for the issuance of every search warrant and are entitled to receive no amount if one is refused or if he finds no probable cause in accordance with GA. CODE ANNO. §24-604, 24-820, and 24-1601. (R.4-6)

(b) <u>STATEMENT OF FACTS</u>:

At the hearing on the Petitioner's Motion to Supress, held November 20, 1975, the State of

of Georgia called two witnesses to testify as to the legality of the search and seizure of the 1974 Van which was seized by law enforcement officers at the residence of LEONARD BRAMBLETT in Dalton, Georgia on or about the 18th or 19th day of August, 1974. HAROLD POE, an agent of the Federal Bureau of Investigation and DON GRIBBLE of the Dalton Police Department testified that on August 18, 1974, they participated in a stake-out of the Crown America Warehouse in Dalton, Georgia. They testified that they were there pursuant to information which they had received that yarn was being stolen from Crown Cotton Mill where it was stored. (Motion to Supress Hearing, T.2) Mr. Carlisle of Wamsutta had verified the fact that Wamsutta Yarn stored at the Crown America Warehouse was missing. (Motion to Supress Hearing, T.2) The information the law enforcement officers had received indicated that a certain individual driving a certain type van with a certain license number was going to be stealing yarn on a particular evening. (Motion to Supress Hearing, T.2) As agent Poe was driving his car toward the Crown

America Warehouse at approximately 11:30 P.M., he pulled into behind a certian van and testified that at the point they had no reason to suspect the van in front of them, but later after checking the license number of the van that was supposed to have been there, "it was the same tag." Mr. Poe testified that the van pulled to the front gate and a man wearing dark clothing got out of the van and walked into the guard shack, and the man driving the van turned the lights off and drove past the guard shack and into the darkness. Mr. Poe testified that a few minutes later a man came out of the darkness from the direction in which the vehicle had turned and was wearing a light colored shirt. Poe testified that a few minutes later both men left the guard shack and went into the building directly behind the guard shack. At approximately 12:55, Poe testified a van similar to the one which he had seen go into the warehouse area exited from the complex in front of the guard shack and Poe started his car and immediately followed it to a point or Selvidge Street. Poe testified as follows:

"We got in behind it close enough to see either at that point or just before it turned into the driveway that the back windows were obscured by something inside. The license tag of the vehicle we pulled in behind in this driveway was the same one that we had pulled in behind before.... The driver of the vehicle got out and I asked him his name and he said it was HOWARD BRAMBLETT. I told him that he was under arrest and I immediately notified Don Gribble and had been talking to him on the radio while I was in pursuit of the vehicle....He (Don Gribble) arrived, called a black and white unit, and from that point I more or less stepped aside as there was no violation over which I had any jurisdiction or did the Government...." (Motion to Supress Hearing, T. 3, 4, 5)

Agent Poe testified on cross-examination that two or three days before August 18, 1974, they had obtained their information from a reliable source. (Motion to Supress Hearing, T. 7) He testified further on cross-examination that after the van was seen leaving the area of Crown America Warehouse, he followed the vehicle, and when he got to a point of fifty to seventy-five feet away, he observed that the windows were obscured. (Motion to Supress Hearing, T.9) He testified further on cross-examination as follows:

Q. "Saw the windows obscured? But you can't testify at that time from what you physically observed and saw, you can't testify as to what they were obscured by, going back in point of time?"

A. "From my view, no sir."

Q. "You can only say and can only testify truthfully, all you could see is that the windows were obscured?"

A. "Yes."

Q. "That the truck pulled into the residence of 519?"

A. "If that's the address, yes, sir."

Q. "Now, let me ask you this question, did you park your vechicle on the street or did you pull your vehicle into the driveway?"

A. "Pulled in into the driveway."

Q. "And did you pull up right behind the van?"

A. "Oh, not to where I was touching, there may have been ten feet between us."

Q. "Now up until the time that you had pulled up within fifty to seventy-five feet and saw the windows obscured in the van, other than from information you had received and the fact that this vehicle fits the description and fits the tag number, you had observed no criminal activity, had you? No traffic law had been violated?"

A. "Not that I know of." (Motion to Supress Hearing, T.9)

Agent Poe testified that the Defendant's Exhibit No. 1 showed approximately where the van was pulled when it stopped. (Motion to Supress Heaing, T. 10,26). He recalled that the motor in the van truck was turned off and did not remember whether anyone was in the house at 519 Selvidge Street. (Motion to Supress Hearing, T.11) He testified also that when he entered the driveway at 519 Selvidge Street, he had no warrant to search the house or premises or the van. (Motion to Supress Hearing, T. 12)

Don Gribble of the Dalton Police Department testified that on August 18, 1974, he participated in the stake-out of Crown America Warehouse, that he signed the affidavit for the search warrant to search the 1974 model Ford Super Van described in State's Exhibit No. 1. (Motion to Supress Hearing, T. 19) The State then introduced into evidence State's Exhibit No. 1, the affidavit of the search warrant and State's Exhibit No. 2 and the Search Warrant itself. (Motion to Supress Hearing, T. 14, 15, 24, 25)

The Search Warrant was issued by Jimmy Campbell, a Justice of the Peace of Dalton, Georgia, after the seizure of the vehicle in the yard at 519 Selvidge Street. The van was then searched pursuant to the warrant by law enforcement officers at the City Hall. (Motion to Suppress Hearing, T. 18) (Emphasis supplied) The van was pulled approximately thirty feet up into the driveway as is shown in Defendant's Exhibit No. 1. (Motion to Suppress Hearing, T. 19) Investigator Gribble testified that the motor to the vehicle was turned off and the Petitioner and his brother were sitting in the backseat of a black and white police car when he arrived. (Motion to Suppress Hearing, T. 19) Detective Gribble testified that he did not remember seeing anyone at the house located at 519 Selvidge Street at that time. (Motion to Suppress Hearing, T. 19) Both the Petitioner and his brother were under arrest at that time and were taken to jail. (Motion to Suppress Hearing, T. 20) Detective Gribble testified that he radioed and called for a wrecker from "Whaley's" and towed the truck from 519 Selvidge Street to the police

station. (Motion to Suppress, T. 20) It was then after agent Poe and other law enforcement officers had entered onto the premises of 519 Selvidge Street and towed the van to the police station that search warrant was obtained. (Motion to Suppress, T. 20) No evidence was introduced on the issue of whether or not Justice of the Peace was neutral and detached magistrate despite the allegations in Paragraphs eight (8) and nine (9) of the amended Motion to Suppress. The trial Judge overuled the Motion to Suppress. (Motion to Supress, T. 23)

REASONS FOR GRANT OF WRIT OF CERTIORARI

(1) WAS THE WARRANTLESS SEIZURE OF A MOTOR VEHICLE, WHICH WAS PARKED IN A DRIVEWAY AT THE TIME OF ITS SEIZURE, DONE WITHOUT PROBABLE CAUSE IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS?

The Supreme Court of the United States set forth most emphatically in its opinion in COOLIDGE VS.NEW HAMPSHIRE, 403 U.S. 443 (91 S. Ct. 2022, 29 L.E. 2d 564) (1971), as a guiding principle in the realm of Constitutional search and seizure the following:

"Thus the most basic Constitutional rule in this area is that 'searches conducted outside the Judicial Process, without prior approval by Judge or Magistrate, are per se unconstitutional under the Fourth Amendment - Subject only to a few specifically established and well-delineated exceptions'. The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption that the exigencies of the situation made that course imperative.' 'The burden is on those seeking the exemption to show the need for it."

COOLIDGE, Supra 454, 455.

In accordance with this Court's pronouncement in COOLIDGE Supra, the warrantless search, therefore, of the premises at 519 Selvidge Street was per se unreasonable and unconstitutional under the Fourth Amendment since it was made without prior judicial

approval, and it was encumbent upon the State of Georgia as the party seeking exemption from the requirement of a warrant to show that the exigencies of the situation made a warrantless entry and seizure imperative. The Petitioner argues that the State of Georgia failed to show the need for such a seizure at that point and both the Court of Appeals and Supreme Court of Georgia have erred in holding that the need for such a seizure was shown and that there was probable cause for a warrantless seizure and that the Trial Judge properly overruled the Petitioner's Motion to Suppress illegally obtained evidence.

The search in this case cannot be justified as a seizure incident to a lawful arrest for the protection of the arresting officers or to prevent the destruction of evidence. CHIMEL VS. CALIFORNIA, 395 U.S. 752 (89 S. Ct. 2034, 23 L.E. 2d 685). At the time of the arrest of the Petitioner, the area subsquently seized by the officers was not in the possession of or under the control of either the Petitioner or his brother and the affirmative testimony of

the officers was that there was nobody at home at 519 Selvidge Street when the Petitioner and his brother were arrested. (Motion to Suppress Hearing, T. 3, 4, 5)

It is equally clear that the warrantless seizure cannot be justified on the grounds that it was an emergency situation. CHAPMAN VS. UNITED STATES, 365, U. S. 610, 615 (81 S. Ct. 776, 779, 5 L.E. 2d 828)

Both the Court of Appeals of Georgia and the Supreme Court of Georgia have attempted to justify this illegal and improper search and seizure on the ground as stated in the Opinions by both Courts that the factual situation presented by this case falls within the automobile exception to the warrant requirement as pronounced by this Court under CARROLL VS. UNITED STATES,267 U. S. 132 (45 S. Ct. 280, 69 L.E. 543) and as followed by this Court in CHAMBERS VS. MARONEY, 399 U.S. 42 (90 S. Ct. 1975 264, L.E. 2d 419 (1970). But the rationale of both CARROLL, Supra and CHAMBERS, Supra simply do not fit the factual context of this case.

The Supreme Court of Georgia in its opinion

stated after considering the factual context of this case that "There is no indication that the agents in the present case had an opportunity to obtain a warrant prior to the time they followed the van into the driveway and arrested the defendant." (Appendix A-9) (239 GA. 336, 340) Agent Poe testified however, that the information from his reliable source had indicated a theft would occur two or three days prior to August 18, 1974, and that the van was described and the tag number even given to him. (Motion to Suppress Hearing, T. 7) He had time between the date he was furnished the information and August 18, 1974, to verify with Mr. Carlisle that yarn was, in fact, missing as he testified, but the Supreme Court of Georgia does not perceive that law enforcement officers had ample time to procure a warrant to search. (Motion to Suppress Hearing, T. 2) That is patently ridiculous and absurd!

Petitioner urges this Court as he has urged the Court of Appeals of Georgia and the Supreme Court of Georgia that COOLIDGE VS. NEW HAMPSHIRE, Supra, is applicable to the facts of

this case and that a search warrant was required to search the motor vehicle.

> "The word 'automobile is not a talisman in whose presence the Fourth Amendment fades away and disappears. And surely there is nothing in this case to invoke the meaning and purpose of the rule of CARROLL VS. UNITED STATES -- no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile." Supra, page 461, 462.

The uncontradicted testimony of the law enforcement officers at the scene of the arrest was that the Petitioner and his brother were both under arrest. The motor vehicle which contained the suspected contraband was parked in a driveway of the residence of the Petitioner's brother, the

motor was turned off and no reason articulated by any officer indicated they suspected that confederates were waiting to move the evidence or that it would have been inconvenient to place a special police detail to guard the immobilized automobile until a warrant was obtained. Under the facts and circumstances as presented by the record in this case the Supreme Court of the United States has an opportunity to once again reiterate and clarify its pronouncement and holding in COOLIDGE, Supra, that "the word 'automobile' is not a talisman is whose presence the Fourth Amendment fades away and disappears," by holding that a warrant was required to seize and search the motor van in this case.

(II) SUBSQUENT TO THE SEIZURE OF THE PARKED MOTOR VEHICLE WAS IT SEARCHED ILLEGALLY UNDER A SEARCH WARRANT WHICH WAS ISSUED BY A MAGISTRATE WHO WAS NOT NEUTRAL AND DETACHED AS REQUIRED BY THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONTITUTION OF THE UNITED STATES?

The Petitioner argues that the search warrant

which was issued by the Justice of the Peace in this case was not issued by a neutral and detached magistrate as required by the Fourth and Fourteenth Amendments to the United States Constitution, in that, he was entitled to receive a fee of FIVE DOLLARS ($5.00) for the issuance of the search warrant and was entitled to received no amount if he refused the search warrant. GA. CODE ANNO. §24-1601 (Acts 1897, pp. - 83, 84; 1878-9 p. 191; 1882-3, p. 110; 1887, p. 55; 1909, p. 175; 1918, p. 124; 1919, p. 99; 1949, pp. 956-959; 1958, pp. 201, 202; 1967, p. 469) The Supreme Court of the United States in CONNALLY VS. GEORGIA, 429 U.S. 245(97 S. Ct. 546, 50 L.E. 2d 444) has declared the fee systems, under which the Justice of the Peace of the State of Georgia issued the search warrant in this case to be unconstitutional in that it destroys the neutrality and impartiality of a magistrate who must find probable cause. As argued by Petitioner previously a search warrant was required to be issued by a magistrate which was neutral and detached within the meaning of the Fourth and Fourteenth Amendments to the

United States Constitution in order to search the motor vehicle under the facts and circumstances of this case. The search warrant which was issued was done so by a Justice of the Peace who had a direct pecuniary interest in the issuance thereof and he was not, therefore, neutral and detached. Although CONNALLY, Supra, was decided after the date of this trial, the Petitioner raised the exact same issue before the Trial Court at the first opportunity afforded him and the Petitioner argues that CONNALLY, Supra, is controlling authority and that the Trial Court erred in denying the Petitioner's Motion to Suppress evidence illegally obtained. COOLIDGE VS. NEW HAMPSHIRE, Supra; SHADWICK VS. CITY OF TAMPA, 407 U.S. 345, 350 (1972); WARD VS. MONROEVILLE, 409 U.S. 57 (93 S. Ct. 80, 34 L.E. 2d 267) (1972); TUMEY VS. OHIO, 273 U.S. 510, 531 (47 S. Ct. 437, 71 L.E. 749) (1927); BENNETT VS. COTTINGHAM, 290 F. Supp. 759, 762 (1968)

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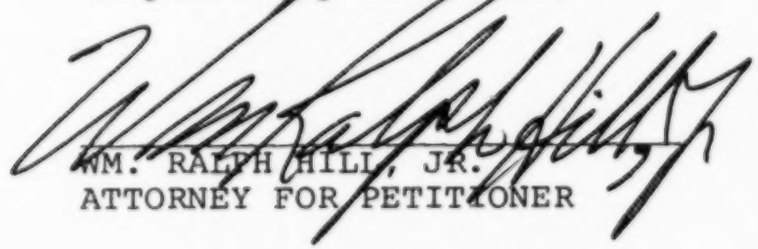
CONCLUSION

The Judgement and opinion of both the Court of Appeal of Georgia and the Supreme Court of Georgia are a unique and unusual departure from a long line of authority established by this Court which must be corrected by the grant of this Court's Writ of Certiorari to review the opinion and order of the Supreme Court of Georgia affirming the Petitioner's Conviction.

Respectfully submitted,



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APPENDIX A

IN THE

SUPREME COURT OF GEORGIA

NO. 31,781

HOWARD BRAMBLETT,

Appellant,

versus

THE STATE OF GEORGIA,

Appellee.

Appeal from the Superior Court of

Whitfield County, Georgia

(June 7, 1977)

In the Supreme Court of Georgia

Decided: June 7, 1977

31781. HOWARD BRAMBLETT v. STATE

HILL, Justice.

The Court of Appeals affirmed the conviction of the defendant after his retrial for theft by taking. Bramblett v. State, 139 Ga. App. 745 (229 SE2d 484) (1976). Certiorari was granted to consider the timeliness of demurrers filed before retrial and the consequences of Connally v. Georgia, No. 76-461, January 10, 1977 (97 SC , 50 LE2d 444) (45 LW 3461), which was decided after the decision of the Court of Appeals.

1. After defendant's first conviction was reversed, Bramblett v. State, 135 Ga. App. 770 (219 SE2d 26) (1975), and before the commencement of the second trial, he filed a

general demurrer on the ground that the indictment failed to set forth acts which constituted a crime and a special demurrer on the ground that the indictment was vague, indefinite and uncertain in describing the property allegedly taken. The trial court overruled the demurrer. The Court of Appeals upheld the ruling of the trial court reasoning that the demurrers were not timely when filed after the defendant had pleaded to the merits of the indictment at his arraignment before the first trial. Bramblett v. State, 139 Ga. App. 745, supra.

A general demurrer challenges the sufficiency of the substance of the indictment, whereas a special demurrer challenges the sufficiency of the form of the indictment. Gilmore v. State, 118 Ga. 299 (1) (45 SE 226) (1903); Lampkin v. State, 87 Ga. 516 (1) (13 SE 523) (1891); Coffee v. State, 219 Ga. 328 (1) (133 SE 2d 590) (1963); see also

Hohenstein v. State, 126 Ga. 536 (55 SE 238) (1906).[1] The Civil Practice Act, enacted in 1966, abolished demurrers in civil cases, Code Ann. § 81A-107 (c). The criminal procedure laws of this state, which retain demurrers to this day, Code Ann. § 27-1501, have not been updated in over 100 years.

According to Code sections 27-1501 and 27-1601, all demurrers to the form of the indictment (i.e., special demurrers) must be made at or before arraignment. Special demurrers not made at or before arraignment are waived. Frady v. State, 212 Ga. 84 (1) (90 SE2d 664) (1955); Burns v. State, 191 Ga. 60, 63 (11 SE2d 350) (1940). Thus it has been held that special demurrers made after the grant of a new trial are untimely. Burns v. State, supra.

A challenge to the sufficiency of the substance of the indictment can be made after

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/1/ Thus, demurrers in criminal cases are not unlike demurrers in civil cases. Leverett, et al., Ga. Proc. & Prac., § 9-2 (1957).

trial by means of a motion in arrest of judgment. White v. State, 93 Ga. 47 (1) (19 SE 49) (1893); Gibson v. State, 79 Ga. 344 (2) (5 SE 76) (1887); Boswell v. State, 114 Ga. 40 (39 SE 897) (1901); Hill v. Nelms, 122 Ga. 572 (1) (50 SE 344) (1905); Gilmore v. State, supra.

Because a motion in arrest of judgment can be made after trial to challenge the substance of an indictment, it follows that a general demurrer can be made before retrial to challenge the substance of the indictment. See Mitchell v. State, 225 Ga. 656 (1) (171 SE2d 140) (1969).[2] The defendant's general demurrer filed in this case was not untimely.

/2/ The inferences in Rucker v. State, 114 Ga. 13, 14 (39 SE 902) (1901), and Reddick v. State, 149 Ga. 822 (102 SE 347) (1919), that after pleading to the merits, a defendant cannot question the substance of the indictment until after conviction, have not been followed. As was said in Gilmore v. State, 118 Ga. 299, 299-300 (45 SE 226) (1903): "If, however, the indictment of accusation is so defective that judgment upon it would be arrested, attention may be called to this defect at any time during the trial..." The case of Bryant v. State, 224 Ga. 235 (161 SE2d 312) (1968), did not involve demurrers are directed to defects which appear on the face of the indictment.

However, the indictment closely follows the statutory definition of the offense, Code Ann. § 26-1802 (a). It clearly charges the defendant and specifies the date and county of the offense, the property taken, its value and its owner. No other substantive deficiencies have been urged by defendant. The trial court did not err in refusing to dismiss the indictment on general demurrer. Ramsey v. State, 212 Ga. 381 (1) (92 SE2d 866) (1956); Robbins v. State, 119 Ga. 570 (1) (46 SE 834) (1904).

2. The defendant urges that the Court of Appeals improperly found that a warrant was not required for the seizure of a van in a driveway and urges that a warrant which was subsequently obtained to search the seized van was invalid under Connally v. Georgia, supra. The circumstances of the seizure are set forth in Bramblett v. State, 139 Ga. App. 745, supra, and are briefly summarized here.

As part of an ongoing investigation of several suspected carpet thefts in the area, government authorities received reports from a company of instances of missing yarn. In response to a tip from a reliable informant, government authorities approached the company's premises at about 11:30 p.m. The agents began following a van whose description and out-of-state license corresponded with information given by the informant. The van, which had transparent windows, was empty when it stopped at the guard house before entering the manufacturer's premises, and it was full when it departed 90 minutes later. The guard made no effort to stop the van on its departure. The agents, aware that no property was authorized to depart the company that night, followed the van until it stopped in a driveway of a private residence. The agents quickly arrested the defendant, who was driving, and his passenger. This passenger, the defendant's brother, lived

in the house where the van had stopped. At this point the agents identified the contents of the van as cartons for yarn. The agents seized the van and had it removed to the station house. A search warrant was obtained from a justice of the peace, and eleven cases of yarn were taken from the van.

Both the trial court and the Court of Appeals properly found probable cause for the arrest of the defendant and for the search of the van. There were sufficient facts from which the agents could reasonably believe that a crime had occurred in which the defendant had participated and that fruits of the crime were inside the van. Draper v. United States, 358 U. S. 307 (79 SC 329, 3 LE2d 327) (1959). The warrantless entry by the agents onto the premises for the purpose of arresting defendant is not barred by the Fourth Amendment. Ker v. California, 374 U. S. 23 (83 SC 1623, 10 LE2d 726) (1963); see also Watson v. United Stated, 423 U. S. 411 (96 SC 820, 46 LE2d 598) (1976); Gerstein v. Pugh, 420 U. S. 103 (95 SC 854,

43 LE2d 54) (1975).

At the outset we must decide whether the warrantless seizure of the van fits an exception to the warrant requirement of the Fourth Amendment, be it a search incident to lawful arrest, the plain view doctrine, or the automobile or Carrol doctrine. Without eliminating the possible applicability of the former two, we will examine the latter doctrine as it is the one argued by the parties.

Defendant contends that a search warrant was required in accordance with Coolidge v. New Hampshire, 403 U. S. 443 (91 SC 2022, 29 LE2d 564) (1971), before the agents could constitutionally seize the van in the driveway. The Supreme Court found that in the circumstances of the seizure in the Coolidge case, no exigency excused the usual requirement that the authorities obtain a warrant. Coolidge found that the requisites of the Carroll doctrine, Carroll v. United States, 267 U. S. 132 (42 SC 280, 69 LE2d 543) (1926), which permits warrantless searches of vehicles

in some situations, did not obtain in the particular circumstances of the Coolidge case. Coolidge, supra at 458-464.

We find the circumstances of the case presently under consideration to be very different from the circumstances which led to the improper seizure and search in Coolidge. Before the authorities in Coolidge arrived on the premises they had obtained a search warrant which was subsequently determined to be invalid. There is no indication that the agents in the present case had an opportunity to obtain a warrant prior to the time they followed the van into the driveway and arrested the defendant. In Coolidge there was no suggestion that on the night in question the car was being used for any illegal purpose or that it contained stolen goods. In the case at hand there was probable cause to believe that the van contained stolen merchandise. The defendant in Coolidge resided at the premises from which his car was taken, and the police were aware that there would be no one

else on the premises who could remove the car. In the present case the defendant was driving a van with out-of-state tags and the informant had said he had a business in that neighboring state. In Coolidge the authorities did not arrest the driver as he alighted from the car.

It is clear that if the van had been stopped by the officers before it pulled into the driveway, it could have been seized under Carroll. The fact that it had stopped in the driveway does not necessarily bring it under Coolidge. The agents who seized the van in this case were aware that several carpet thefts had occurred recently in the area, were aware that the two arrested men could not process yarn into carpet without assistance of others, and were aware that a third man, the guard, knew that the loaded van had left the manufacturer's premises. They did not know whether the house where the van was located was occupied. Thus they could reasonably have concluded that the van and its contents could be removed if

left unattended. The requirements of the Carroll doctrine as set forth in Chambers v. Maroney, 399 U. S. 42, 50-52 (90 SC 1975, 26 LE2d 419) (1970), were fulfilled in the case now before us and the seizure of the van did not infringe any constitutional rights of the defendant. Carlton v. Estelle, 480 F2d 759 (5th Cir. 1973); United States v. Evans, 481 F2d 990 (9th Cir. 1973); United States v. Connolly, 479 F2d 930 (9th Cir. 1973).

The defendant contends that the search of the van at the station house violated the Fourth Amendment because it was conducted pursuant to a warrant issued by a partial magistrate. Connally v. Georgia, supra. The state contends that Connally should be applied prospectively only. Regardless of the application of Connally, in this case no warrant was required for the search of the van at the station house. Both the probable cause and the mobility elements of the Carroll doctrine which existed at the time the van was seized

still obtained at the station house. Texas v. White, 423 U. S. 67 (96 SC 304, 46 LE2d 209) (1975); Chambers v. Maroney, supra at 52. Therefore, evidence was not unconstitutionally obtained from the van and the Court of Appeals did not err in so finding.

Judgement affirmed. All the Justices concur.

APPENDIX "B"

SUPREME COURT OF GEORGIA

Atlanta, July 1, 1977

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Howard Bramblett v. The State

Upon consideration of the motion for rehearing filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA

OCTOBER 11, 1977

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Hazel E. Hallford, Deputy Clerk.

APPENDIX "C"

IN THE SUPREME COURT OF GEORGIA

HOWARD BRAMBLETT, APPLICANT FOR CERTIORARI	CASE # 31,781 SUPREME COURT OF GEORGIA
-versus-	
STATE OF GEORGIA, RESPONDENT IN CERTIORARI	

NOTICE OF INTENTION
TO APPLY FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

TO: THE CLERK OF THE SUPREME COURT OF GEORGIA:

You are hereby notified that it is the intention of HOWARD BRAMBLETT, Applicant, to apply to the Supreme Court of the United States for Writ of Certiorari to review the Judgement of the Supreme Court of Georgia rendered and filed in the above and foregoing stated case on June 7, 1977, in which case a Motion for Rehearing was denied on July 1, 1977. A complete copy of the record is hereby ordered.

THIS 27th day of July, 1977.

s/WM. RALPH HILL, JR.
ATTORNEY FOR APPLICANT

APPENDIX "C"

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the within and foregoing Notice upon the following by placing a copy of same in an envelope properly addressed to each of them and depositing it in the United States Mails with sufficient postage thereon to reach its destination:

The Hon. Charles A. Pannell, Jr.
District Attorney, Conasauga Judicial Circuit
Whitfield County Courthouse
Dalton, Georgia 30720

&

The Hon. Arthur K. Bolten
Attorney General
Judicial Building, Room 132
Atlanta, Georgia 30303

THIS 27th day of July, 1977.

s/WM. RALPH HILL, JR.
ATTORNEY FOR APPLICANT

CERTIFICATE OF SERVICE

This is to certify that I have this date served three copies of the Petition for Writ of Certiorari upon the following by placing the copies of same in an envelope properly addressed to them and depositing same in the United States Mail with sufficient postage thereon to reach their destination, to wit:

The Honorable Charles Pannell
District Attorney
Conasauga Judicial Circuit
Whitfield County Courthouse
Dalton, Georgia

AND

The Honorable Arthur K. Bolton
Attorney General of the State of Georgia
Judicial Building
Room 132
Atlanta, Georgia

This_____day of October, 1977.

ATTORNEY FOR PETITIONER

Supreme Court, U. S.
FILED
DEC 9 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-618

HOWARD BRAMBLETT,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-618

HOWARD BRAMBLETT,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

QUESTIONS PRESENTED

1.

Where information received by a reliable informant is later corroborated by law enforcement officers during their surveillance of a warehouse, and where the officers observed an empty van enter the warehouse premises, and later leave fully loaded during the late

night hours when they knew that no departure of merchandise from the warehouse was authorized, did these officers have probable cause to later arrest the occupants of the van and conduct a search without having previously obtained a warrant after having followed the van to a private residence other than that of the defendant?

2.

Should this Court consider the question of whether Connally v. Georgia, 429 U.S. 245 (1977) should be applied retroactively or prospectively when a search warrant was subsequently obtained after the police had earlier arrested and searched the defendant and the van he was driving following their surveillance of the defendant pursuant to information received from a reliable informant?

STATEMENT OF THE CASE

As a result of reports from various companies in the northwest Georgia county of Whitfield concerning suspected losses of yarn used in the manufacturing of carpeting, local and federal law enforcement agents received information from a reliable informant that yarn was being stolen from the Crown Cotton Mill, and that on August 18, 1974 an additional theft of yarn from the Crown Cotton Mill was to take place. The informant also told the law enforcement officers that the individual who would be involved in this theft would be driving a light colored Ford Econoline van, with a certain license number, and that the yarn would be taken from the warehouse sometime after midnight. While one of the law enforcement officers was driving his automobile in the direction of the Crown Warehouse at around 11:30 p.m. he came up behind a van, and upon checking the license number of the van discovered that it bore the same tag number of the vehicle which their informant had said would be used in the theft of the yarn from the warehouse on that particular evening. This officer also noticed that the van had transparent windows, and was empty when it entered the premises upon which the warehouse was located, and that when it left approximately an hour and a half later it was full. The law enforcement officers had also previously checked with the manager of the warehouse and had learned that there were no authorized shipments that would be leaving the warehouse on the night in question.

When this particular van departed from the mill warehouse it was followed by an agent until it parked in the driveway of a private residence which did not belong to the defendant. The officer's car pulled up behind the van after it had parked, with the officer getting out of his car and walking along side the van where he once again noticed that the windows were covered by what appeared to be cardboard boxes. This van also bore the same tag number as the van which the officer had earlier seen entering the warehouse area, and had the same tag number as had been described to the officers by the informant. Before the defendant had an opportunity to get out of the van the agent arrested the defendant and his passenger. The contents of the vehicle were identified at that time as being cartons in which yarn was customarily packaged. The officers then called for a tow vehicle so that the van could be transported to the Dalton Police Department. A search warrant was also obtained from a local justice of the peace after the van had been towed to the police department.

It is the petitioner's contention that the law enforcement officers were unauthorized to search the vehicle in the driveway of the residence of his brother, as well as conducting a later and more thorough search at the police department following the towing of the van to that location. Petitioner contends that the law enforcement officers had a sufficient opportunity to obtain a search warrant, but even under that warrant his motion to suppress should have been granted since the warrant was not obtained from a neutral and detached magistrate.

Both the Georgia Court of Appeals and the Georgia Supreme Court have found the petitioner's arguments to be without merit. Bramblett v. State, 139 Ga. App. 745, 229 S.E. 2d 484 (1976); Bramblett v. State, 239 Ga. 336, 236 S.E. 2d 580 (1977).

BEST COPY AVAILABLE

REASONS FOR NOT GRANTING THE WRIT

A. BASED UPON THE RECEIPT OF RELIABLE INFORMATION WHICH WAS SUBSEQUENTLY CORROBORATED BY THE LAW ENFORCEMENT OFFICERS THROUGH SURVEILLANCE THERE WAS SUFFICIENT PROBABLE CAUSE PLUS THE EXISTENCE OF EXIGENT CIRCUMSTANCES TO JUSTIFY THE SEARCH OF THE VAN EITHER AT THE PLACE OF ARREST, OR LATER UPON ITS BEING TOWED TO THE POLICE STATION.

The question presented to this Court by the petitioner is whether the search of his van immediately following his arrest comes within the recognized exception to warrantless searches of automobiles under Carroll v. United States, 267 U.S. 132 (1925) and Chambers v. Maroney, 399 U.S. 42 (1970), or whether the law enforcement officials were required as is urged by the petitioner under Coolidge v. New Hampshire, 403 U.S. 443 (1971) to have obtained a search warrant before going through the van, either at the situs of the petitioner's arrest, which was in the driveway of his brother's home, or later after the vehicle had been towed to the police department. Both Georgia appellate courts found that the facts in this case justified a warrantless intrusion into the petitioner's van based upon the law enforcement officers having probable cause to not only arrest, but to search the van because of the presence of exigent circumstances. Bramblett v. State, 139 Ga. App. 745, 748, supra; Bramblett v. State, 239 Ga. 336, 341, supra.

In this case the information which the law enforcement officers had received from a reliable informant was independently corroborated by an independent surveillance by those law enforcement officers, individuals who saw a van which both fit the color description and out-of-state tag as given to them by the informant enter the premises of a warehouse which had previously experienced theft of certain carpeting yarn. These officers also noted that the van when it entered the warehouse premises was empty, and that when it left it appeared to be loaded. The officers were also aware of the fact that there were no authorized shipping departures on the night in question, and that the guard made no attempt to stop the van when it left the warehouse area. Following the van's leaving the warehouse the officers followed the van to an unknown residence, a house which appeared to be unoccupied. Thus, the law enforcement people were dealing with an out-of-state vehicle which had pulled into the driveway of an unknown residence, which appeared to be unoccupied, plus the fact that there existed other participants in the scheme who could have returned to the location of the vehicle containing the stolen yarn to transport it outside the state as well as outside the jurisdiction in which a warrant could be obtained. The Georgia Supreme Court pointed out that it was quite possible that the law enforcement officers could have considered the gate guard at the warehouse as having knowledge as to where the van was parked should the officers have left the van in order to obtain a search warrant. Bramblett, supra at p. 341.

The petitioner in support of his contention that it was first necessary to obtain a warrant before his van was searched relies exclusively upon Coolidge v. New Hampshire, supra. However, as pointed out by both Georgia appellate courts the factual situation in the petitioner's case is significantly different from that which occurred in Coolidge, supra. For one thing, the law officers in this instance did not have an opportunity to obtain a warrant prior to the time they first came upon the van and subsequently followed it into the driveway of the home which turned out to be that of the petitioner's brother. Additionally, unlike the situation in Coolidge, the officers had sufficient probable cause to believe that the petitioner's van contained stolen merchandise, as in Coolidge there was no indication that the car parked in the driveway had been used for any illegal purpose. The premises upon which the petitioner's vehicle was located at the time of his arrest and subsequent search did not belong to the petitioner, as in Coolidge the search of the automobile occurred on premises owned by the defendant in that case. Further distinguishing features in this case are the fact that the vehicle had out-of-state tags, and the law enforcement officers knew from having talked with the informant that the petitioner was engaged in a business in a neighboring state, plus the fact that carpet yarn could not be made into its final product without the assistance of others who may have known the location of the vehicle at that time. Lastly, Coolidge can be factually distinguished since the driver of the vehicle in this instance was arrested before he got out

of the van, as in Coolidge the owner of the car was arrested at his house, some distance removed from the vehicle.

Under the Carroll doctrine probable cause will justify a warrantless search of an automobile when there are facts and circumstances within the officer's knowledge based upon reasonably trustworthy information which would lead them to believe as men of reasonable caution that an offense has been or is being committed. In these instances it must be kept in mind that, "In dealing with probable cause, . . . as the very name implies, we deal with probability. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Brinegar v. United States, 338 U.S. 160, 175 (1949). Respondent fully recognizes that while the constitutional demands for a permissible search of an automobile are somewhat less stringent, law enforcement officers nevertheless must have probable cause, and that the facts in this instance unequivocally demonstrate the existence of probable cause for the search. Draper v. United States, 358 U.S. 307 (1959); United States v. Valenzuela, 546 F. 2d 273 (9th Cir. 1976); United States v. Ferrara, 539 F. 2d 799 (1st Cir. 1976); United States v. Mitchell, 538 F. 2d 1230 (5th Cir. 1976); cert. denied, ___ U.S. ___, 97 S. Ct. 1578 (1977); United States v. Waddey, 536 F. 2d 632 (5th Cir. 1976); Lee v. United States, 376 F. 2d 98 (9th Cir. 1967), cert. denied, 389 U.S. 837 (1967).

On the night the petitioner was arrested the law enforcement officials had sufficient probable cause plus exigent circumstances to justify their search of the petitioner's van either in the driveway of the petitioner's brother's home, or later after it was towed to the police department without obtaining a search warrant. "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant given probable cause to search, either course is reasonable under the Fourth Amendment." Chambers v. Maroney, supra at p. 53. Accord Texas v. White, 423 U.S. 67 (1975). Since probable cause existed at the time of the petitioner's arrest to search, the subsequent action of the police officers in also obtaining a search warrant for the purposes of this discussion is moot.

B. THIS IS NOT THE PROPER CASE IN WHICH TO DETERMINE WHETHER CONNALLY V. GEORGIA[1] SHOULD BE APPLIED RETROACTIVELY.

Inasmuch as the law enforcement officers had probable cause to search the petitioner's van either at the place of his arrest or later at the police station, Texas v. White, supra; Chambers v. Maroney, supra, the subsequent application by the law enforcement officers for a search warrant to a justice of the peace who received a fee only upon the issuing of such a warrant need not be reached, neither it is necessary to reach the question of whether this practice for the obtaining of search warrants which this Court struck down in Connally v. Georgia, supra, should be applied retroactively to the present case. In short, this is not the right case for this Court to determine the question of whether Connally, supra, is to be given prospective or retrospective application, since this Court need not reach the Connally issue because of the fact that the law enforcement officers had probable cause to search without obtaining a warrant.

Should this Court, however, be interested in examining the question of whether Connally, supra, should be applied retroactively or prospectively, respondent offers the following as a reason for not applying Connally, supra, retroactively. In the past when this Court has been called upon to determine whether one of its

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[1] 429 U.S. 245 (1977).

earlier decisions concerning a constitutional violation will be applied retroactively, the test seems to be whether the violation is one which directly affects the integrity and truth of the factfinding process of the trial rendering it a constitutional issue which addresses itself to the fundamental fairness of a trial. It thus seems that if the constitutional violation does go to the integrity and truth of the factfinding process that the decision will be applied retroactively. See Hankerson v. North Carolina, ___ U.S. ___, 53 L. Ed. 2d 306 (1977), holding Mullaney v. Wilbur, 421 U.S. 684 (1975) retroactive. See also Tehan v. Shott, 382 U.S. 406 (1966), holding that Griffin v. California, 380 U.S. 609 (1965) to be retroactive. If, on the other hand, the decision concerning a constitutional violation goes to a pretrial procedural guarantee then it appears that this Court will apply that decision prospectively. For example, Adams v. Illinois, 409 U.S. 505 (1973) declines to hold that Coleman v. Alabama, 399 U.S. 1 (1970) will be applied retroactively, as does Linkletter v. Walker, 381 U.S. 618 (1965) decline to hold that Mapp v. Ohio, 367 U.S. 643 (1961) will be given retroactive application. Likewise, in Johnson v. New Jersey, 384 U.S. 719 (1966), this Court declined to hold that either Escobedo v. Illinois, 378 U.S. 478 (1964) or Miranda v. Arizona, 384 U.S. 436 (1966) would be applied retroactively. See also Williams v. United States, 401 U.S. 646 (1971), which held that Chimel v. California, 395 U.S. 752 (1969), would only be given prospective application.

Primarily because this is not the proper case to determine the issue of retroactivity for Connally, respondent additionally urges this Court that the petition for certiorari be denied.

CONCLUSION

For these reasons, respondent respectfully urges this Court to deny the petition for writ of certiorari filed on behalf of the petitioner, Howard Bramblett.

Respectfully submitted,

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ROBERT S. STUBBS, II
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CERTIFICATE OF SERVICE

I, John C. Walden, Attorney of Record for the respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the petitioner by depositing three copies of same in the United States mail, with proper address and adequate postage to:

Mr. William Ralph Hill, Jr.
P. O. Box 1350
Lafayette, Georgia 30728

This 7th day of December, 1977.

/s/
JOHN C. WALDEN